MEDIATING BUSINESS DISPUTES

At the January, 2005 Section Education Institute, BLS ADR Committee members Eleanor Barr, Jane Garzilli and Michael Carbone presented a panel discussion entitled "Mediation Strategies: A Business Lawyer's Guide To Successful Negotiation." The following article is a synopsis of the discussion.*

There are many differences between the mediation of a business case and other kinds of cases, such as actions for personal injury. Hence, the mediation of a business dispute requires a different approach on the part of counsel. The negotiating strategy, the roles of the participants and the structure of the mediation will all vary according to the nature of the matter as well as the styles and skills of the persons involved.

A mediation is a facilitated settlement negotiation. Regardless of the kind of case, it is necessary to formulate a negotiating strategy beforehand. In business disputes, however, the strategizing is likely to be more complex.

Initially, the lawyer must determine whether the interests of the client dictate a strategy that is purely competitive or one that is partly, if not primarily, cooperative. If the dispute is only about money, such as the recovery of damages for breach of contract from a solvent debtor, a purely competitive strategy is usually indicated. The goal will be simply to get as much, or to keep as much, for the client as possible. Still, the lawyer must take into account the client's attitude toward litigation. How does the client feel about the time, energy, cost and risks that are associated with lawsuits? Will these attitudes call for a more accommodating approach?

The strategy will likely be different if other interests are at stake. For example, the client may want to preserve or cultivate a valuable business relationship with the other side. He may face a debtor in financial difficulty. Or the litigation may have potentially adverse consequences for the client's business reputation. In such cases a more cooperative approach will be required. Many business disputes will involve several of the factors just described. These cases call for a strategy that is partly competitive and partly cooperative.

Once the client's interests are understood, the formulation of the appropriate strategy should be a joint effort on the part of the attorney and client. A negotiating strategy involves more than just deciding on how much to demand and what to settle for. The attorney and client should review together the various steps to be taken, including the choice of a mediator, the convening process, the respective roles that the attorney and client will play and the correct use of joint sessions and caucuses.

When choosing a mediator lawyers usually look first for someone with expertise in the subject matter. While such expertise is valuable and should be sought, a more important objective is to find a mediator whose skills fit the negotiating strategy that has been chosen.
If the negotiation is strictly competitive, a mediator who can analyze and offer opinions on legal and factual issues, act as a devil's advocate and manage and control a monetary negotiation should be employed. If the strategy is to be more cooperative, the mediator should be skilled at facilitating direct communication between the parties. If, as is often the case, the strategy is to be both competitive and cooperative, the parties should choose a mediator with a range of skills and a flexible style. The best mediators are able to employ a variety of techniques and will adapt themselves to the needs of the case as the mediation progresses.

The parties need to agree in advance on who will attend the mediation. Except in unusual circumstances, the real decision makers should always be present. However, it is not always possible to satisfy this requirement when corporate parties are involved. In such cases, permission should be sought from the mediator and the other side to have the person who holds settlement authority available by telephone.

Consideration should also be given to inviting others whose presence would be helpful because of their expertise or their knowledge of the facts pertinent to the dispute. Before giving them a seat at the table, however, counsel should be sure that they understand the nature of the mediation process and that their presence will not be a hindrance. Persons who were directly involved in a transaction giving rise to the dispute can often make important contributions. But if they are apt to be overly defensive about their actions, they should either be excluded from the mediation or else admonished not to behave in a counterproductive manner.

Attorneys are used to being in charge of negotiations and doing most of the talking. In business mediations, however, it is common for the client to take a more active role. Clients in these situations often have superior knowledge of the facts. They also have expertise in their industries. These factors make it advisable for them to explain their case directly instead of through an intermediary.

A client who is also a good negotiator may wish to take the lead in bargaining for a settlement. In such cases, the attorney's role will be limited to providing legal counsel, strategizing with the client and the mediator regarding settlement proposals and documenting the settlement agreement.

In cases where the attorney is the lead negotiator, his style must be consistent with the agreed-upon strategy and flexible enough to be effective. A purely competitive negotiator, while being a strong advocate for his client's position, may also be so aggressive as to alienate the other side and jeopardize the negotiation. A purely cooperative negotiator, on the other hand, may be able to keep the other side at the table but also might risk being taken advantage of. The artful negotiator will be able to strike a balance between the two styles, generally by taking one approach rather than the other at different stages of the mediation.

Interestingly, transactional attorneys can often do as well if not better than trial attorneys in a business mediation because of the strong set of negotiating skills that they have developed in their practices. As a result, it sometimes makes sense to have a business lawyer, either alone or in collaboration with a trial lawyer, represent the client at the mediation. Most civil mediations are conducted according to the caucus model. Following a joint session in which each side makes a statement of position, the mediator meets privately with the parties and helps them to assess the strengths and weaknesses of their positions. The mediator will then convey settlement proposals back and forth until an agreement is reached. Many business mediations follow this same model. But parties sometimes will prefer to make more extensive use of the joint session. Indeed, some business mediations are conducted entirely in joint session.

Many lawyers are reluctant to make use of an extended joint session. Either they fear losing control of the client or are afraid that the process will become confrontational. But important opportunities can be missed by rushing immediately into separate caucuses.
It is far easier to explore complex factual situations when everyone is sitting in the same room. Each side talks directly to the other, questions can be asked and answered and comments made. Issues can be narrowed and misunderstandings can be cleared up, allowing the parties to focus on the main items in controversy.

A joint session also provides an opportunity to make an apology in cases where a party has been at fault. An apology is one of the most effective tools that can be used in mediation and is particularly useful in cases where a cooperative strategy is being employed. An apology is not admission of legal liability but rather an expression of regret. It tends to clear the air and will often put the other party in a more receptive frame of mind.

Finally, a joint session can provide an opportunity to explore options for settling the case. Many business people have a preference for negotiating face to face. They would rather see a mediation conducted in the same manner as their daily business instead of through a conduit. In fact, business people in some situations will ask their attorneys or a mediator to let them meet privately and try to resolve the case on their own.

Successful mediation of a business dispute demands flexibility on the part of all participants. An attorney or a mediator who has only one style and cannot adapt to the situation at hand will have difficulty in resolving the case. Attorneys should focus primarily on the interests and desires of their clients and be willing to venture outside of their comfort zone when the situation requires. In doing so, they will be more likely to achieve successful outcomes and walk away with satisfied clients.

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lectures and writes on a variety of mediation topics. You may learn more about Eleanor's mediation practice by visiting www.eleanorbarr.com.

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